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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1970

IN RE JOHN ALEXANDER WOMACK and JAMES ANDREW ROBINSON, Witnesses Before the Special February 1971 Grand Jury, Northern District of Illinois, Eastern Division,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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TO: *The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States.*

The Petitioners, John Alexander Womack and James Andrew Robinson, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit dismissing, as frivolous, an appeal from orders entered by the United States District Court for the Northern District of Illinois, Eastern Divi-

sion, adjudicating the petitioners in contempt of Court for failure to answer questions asked of them before the Special February, 1971 Grand Jury, now sitting in said District, and remanding said petitioners to the Cook County Jail, Chicago, Illinois, until such time as they shall answer the questions. They have been in custody since May 25, 1971.

ORDER BELOW

The order of the Court of Appeals for the Seventh Circuit is not yet officially reported. It is printed in the Appendix to this Petition. (App. 1-5)

JURISDICTION

The order of the United States Court of Appeals for the Seventh Circuit dismissing the appeal from the orders of the District Court was entered on June 17, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Where a new statute covers the same subject matter applicable to the same persons in identical circumstances, as an older one, and prescribes different immunity than the old law, can both statutes remain in effect at the same time?

2. Regardless of the intention of Congress to keep both statutes in effect at the same time, is not the question of repeal by operation of law a judicial question, to be determined by the courts?

3. Assuming arguendo it is possible to have two valid subsisting conflicting statutes, and that the Legislature intended that the Executive determine which of the statutes should be employed, whether it is not an unauthorized

delegation of Legislative power to the Executive to make that election without guidelines and standards as to when the one or the other shall be employed?

4. Can the Congress take away the protection of the Fifth Amendment by legislation contrary to the provisions of Article V of the Constitution of the United States providing for referendum?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

FOURTH AMENDMENT — CONSTITUTION OF THE UNITED STATES.

Amendment IV — Searches and Seizures

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FIFTH AMENDMENT — CONSTITUTION OF THE UNITED STATES

Amendment V — Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life,

liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 18 U.S.C. §6002

"Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to —

"(1) a court or grand jury of the United States,

"(2) an agency of the United States, or

"(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order."

Title 18, U.S.C. §6003

§ 6003: Court and grand jury proceedings

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses

to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

Added Pub.L. 91—452, Title II, § 201(a), Oct. 15, 1970, 84 Stat. 927.

Title 18, U.S.C., §2514 provides as follows:

"§2514. Immunity of witnesses.

"Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any violation of this chapter or any of the offenses enumerated in section 2516, or any conspiracy to violate this chapter or any of the offenses enumerated in section 2516 is necessary to the public interest, such United States attorney, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evi-

dence required of him may tend to incriminate him or subject him to a penalty or forfeiture. No such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except in a proceeding described in the next sentence) against him in any court. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section."

Title 18, U.S.C., §2516 provides as follows:

"§2516. Authorization for interception of wire or oral communications.

"(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of—

* * *

"(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), subsection (d), (e), (f), (g), (h) or (i) of section 844 (unlawful use of explosives), section 1084 (transmission of wagering information), section 1503 (influencing or injuring an officer, juror, or

witness generally), section 1510 (obstruction of criminal investigations), section 1511 (obstruction of State or local law enforcement), section 1751 (Presidential assassinations, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 1955 (prohibition of business enterprises of gambling), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), or sections 2314 and 2315 (interstate transportation of stolen property), section 1963 (violations with respect to racketeer influenced and corrupt organizations);

* * *

"(g) any conspiracy to commit any of the foregoing offenses."

STATEMENT OF FACTS

On or about March 18, 1971, these applicants appeared before the above-described Special Grand Jury, which was then purportedly investigating into alleged violations of Title 18, Sections 1511, 1951, 1952, and 1955 of the United States Code—all assumedly relating to gambling violations.

Pertinent to this case is the decision of the United States Court of Appeals for the Seventh Circuit on May 20, 1971, when in a cause entitled *In the Matter of Jack Korman and Robert W. Likas, Witnesses before Special 1971 Grand Jury*, No. 71-1328, that Circuit reversed a judgment of contempt in like premises where immunity had been granted pursuant to the provisions of Title 18, U.S.C., §6002. The United States Court of Appeals for the Seventh Circuit found said section irreconcilable with the

Fifth Amendment privilege against self-inerimination and unconstitutional.[1] Title 18, U.S.C., §6002 with which that case is concerned provides in pertinent part:

> "§6002. Immunity generally.
>
> "Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before * * * (1) * * * grand jury of the United States,
>
> * * *
>
> and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order."

That provision was enacted into law on October 15, 1970.

Almost immediately after the Seventh Circuit decision of May 20, 1971, in the *Korman* case, these petitioners were notified to appear before the Special February 1971, Grand Jury on May 25, 1971. They again invoked their privilege against self-incrimination to the questions put to them. These facts were related to Judge Austin of the United States District Court for the Northern District of Illinois, who, thereupon, and on petition therefor by the United States Attorney, supported by a letter indicating

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[1] On approximately June 18, 1971, the Solicitor General filed a Petition for a Writ of Certiorari in said cause, and asked it be held in abeyance pending this Court's disposition of *Stewart* v. *United States,* No. 1562, now pending in this Court.

the approval of the Attorney General of the United States, granted petitioners an immunity pursuant to the provisions of Title 18 USC, §2514 and directed them to testify in response to the questioning of, or on behalf of, the Grand Jury. Title 18, U.S.C., §2514 provides as follows:

"§2514. Immunity of witnesses

"Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any violation of this chapter or any of the offenses enumerated in section 2516, or any conspiracy to violate this chapter or any of the offenses enumerated in section 2516 is necessary to the public interest, such United States attorney, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. No such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except in a proceeding described in the next sentence) against him in any court. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section."

This statute was enacted June 19, 1968, and its provisions extend to certain enumerated offenses. Section 6002, on the other hand, is applicable to "any proceeding" by the provisions of 18 U.S.C. §6003.

Upon receiving the immunity under §2514, the petitioners here were taken, again, before the Grand Jury, asked questions, and there persisted in the invocation of their privilege against self-incrimination. They were thereupon adjudged in contempt of Court, denied bail, and ordered incarcerated until such time—if that time come—that they purge themselves by testifying before the Special February 1971 Grand Jury, or until the life of the Grand Jury was spent.[2]

Thereupon a notice of appeal was forthwith filed before the United States Court of Appeals for the Seventh Circuit, detailing the aforesaid events and praying that reasonable bail be granted pending appeal of the orders adjudging contempt.

On June 3, 1971, the United States Court of Appeals denied bail stating as a basis therefor, the following:

> "Congress expressly provided that the repeal of 18 U.S.C. §2514 shall become effective four years following the sixtieth day after the date of the enactment of Public Law 91-452, which was approved October 15, 1970, with such repeal not to affect any immunity to which any person is entitled thereunder by reason of any testimony given before such repeal. In view of this clear legislative intention (*United States* v. *Claflin,* 97 U.S. 547 (1878)), we

[2] Their incarceration is in Cook County, Illinois, jail, a jail of unfortunate reputation. An astounding record of suicides by inmates in the past twelve month period has been recorded and reported in the news. The record is, we submit, pertinent in that these men have been convicted of no crime.

> conclude that this appeal may be frivolous or taken for delay and therefore the applicants should not be admitted to bail pending determination of the appeal. 28 U.S.C. §1826(b).
>
> "The emergency application for bail is denied."

Public Law 91-452, which was approved on the same day as Section 6002, and to which the Seventh Circuit adverts in its opinion, reads as follows:

> "Section 2514 of Title 18, United States Code is repealed effective four years after the effective date of this Act."

Title 28, U.S.C. §1826(b), upon which the Seventh Circuit relied in denying bail provides as follows:

> "(b) No person confined pursuant to subsection (a) of this section [refusal of a witness to testify without just cause] shall be admitted to bail pending the determination of an appeal taken by him from the order for his confinement *if it appears that the appeal is frivolous or taken for delay.* Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal." (Emphasis supplied)

There was included in the bail denial order, an expedited schedule pursuant to the provisions of Title 28, U.S.C. §1826(b):

> Appellants' brief due June 9, 1971
> Appellee's brief due June 15, 1971
> Reply brief due June 18, 1971
> Oral argument June 22, 1971, at 10:00 A.M.

Pursuant to the schedule, and within four days of receiving the order the day following its entry, these petitioners submitted their brief arguing their several bases

for appeal, thereby obviating any reasonable contention that the appeal was taken for "delay." The arguments in the brief were directed to a contention that the appeal was not "frivolous", and therefore, bail was required, under the provisions of §1826(b), to be granted. Thus, simultaneously with the filing of the brief on June 9, 1971, these petitioners renewed their motion for bail, setting forth their contentions of no purpose of delay, and a want of frivolity. The questions presented to that Court are substantially the same as presented here. On June 17, 1971, the Court of Appeals for the Seventh Circuit dismissed the appeal as frivolous as above stated, and, accordingly found it "need not pass on the renewed motion for bail" (See Appendix). This petition follows.

REASONS FOR GRANTING THE WRIT

I.

This case involves an important statutory issue which ought to be decided by this Court as it involves the construction and application of two Acts of Congress, criminal statutes, which cover the same subject matter applicable to the same persons in identical circumstances. An important issue which arises out of this coexistence is whether the Congress can enact a new law covering the same matter as the old law and yet direct the old law to remain in full force and effect pending a test of the constitutionality of the new law. The petitioners have sought in vain to find any repealing provision of law carrying a delayed repeal of four years, with a substituted Act to be in full force and effect during the pendency of the four years. It is respectfully suggested to this Court that this is a novel and important question of law involving statutory construction that has been decided in a manner in conflict with decisions of this Court (U.S. v. Claflin, 97 U.S. 546 and Dist. of Col. v. Hutton, 143 U.S. 18).

The United States Court of Appeals for the Seventh Circuit made its ruling and determination to dismiss the appeal herein as to the two initial points presented on the ground that these petitioners "assume" a conflict between 18 U.S.C. §2514 and §6002, which "appellants have not established." (App. 5)

We think the conflict is clear, and the probability—at least—of conflict was recognized by the proponents of the latter Act [§6002], as is graphically demonstrated by the following exchange:

"Mr. Wilson: Well, I don't immediately react on what the constitutional effect of not repealing the old ones would be, but leaving aside any impairment of constitutionality, I can see no—

"Senator McClellan: You might give some thought to that so we will not let a gap occur.

"Mr. Wilson: You couldn't have two statutes in conflict." *Hearings on S. 30 Before the Subcom. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary,* 91st Cong. 1st Sess. 404 (1969).

We submit that merely looking at the two statutes, demonstrates conclusively that we *do* "have two statutes in conflict."

The earlier statute (§2514) defining the conditions under which the availability of its "transactional" immunity becomes operative states:

"Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any violation of this chapter or any of the offenses enumerated in section 2516,[2] or any conspiracy to violate this chapter or any of the offenses enumerated in section 2516 is necessary to the public interest."

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[2] The provisions of this statute extend to offenses involving wire interception, capital offenses, offenses relating to the Atomic Energy Act, espionage, sabotage, treason, riots, labor law violations, murder, kidnapping, robbery, or certain types of extortion, bribery of public officials or in sporting contests, transmission of wagering information, influence of officers, jurors or witnesses, obstruction of justice, assault upon the President, interstate threats or violence, travel in aid of racketeering, theft from interstate shipment, interstate transportation of stolen property, counterfeiting, bankruptcy fraud, extortion of credit transaction, and any conspiracy to commit any of those offenses.

The later statute (§6003) defining the conditions under which the availability of the "use" immunity of §6002 becomes operative equally provides:[3]

> . . . when in his [a United States Attorney's] judgment, the testimony or other information from such individual (who has been or may be called to testify) in a proceeding before or ancillary to a court or grand jury of the United States, may be necessary to the public interest. . . .

The only distinction between the two statutes is that §6003 is more expansive than is §2514, in that §2514 relates to proceedings involving enumerated offenses, and §6003 gives the right to grant its "use" immunity when the evidence *may*, in the United States Attorney's judgment, be necessary to the public interest, while §2514 requires a judgment that it *is* necessary in the same public interest.

It is manifest that both statutes have the same purpose (the availability of a coercion) to be employed in identical circumstances, and the only distinction lies in the form of the coercion. If this is so—as we submit it is, the Act of 1970 supplied the provisions of the coercion provisions of the 1968 Act, and, consequently repealed them, with or without a repealing clause. See *United States* v. *Claflin*, 97 U.S. 546. For "it is not open to controversy, that when a new statute covers the whole subject matter of an older one, as offenses, and prescribes different penalties for those enumerated in the old law, that then the former statute is repealed by implication as the provisions of both cannot stand together." *Norris* v. *Crocker, et al.*,

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[3] We have rearranged the wording (but changed none) to conform to the grammatical sequence of the earlier statute to more clearly demonstrate that the "conditions" are identical.

13 How. 429, 14 L. Ed. 210, 213-14. In that case, the question was whether an Act of 1793 was repealed by an Act of 1850, was overruled by the latter statute which applied to a forfeiture "for each fugitive [slave] lost." The Supreme Court held it did and repealed the earlier inconsistent provisions, insofar as they affect slaves lost.

So also here, the provisions of §6003 so far as they describe the identical persons, in the identical circumstances, affected by §2514 repealed §2514, and that repeal results by operation of law, not by legislative intendment.

This case is admittedly complicated by the Congress articulating an intent that these statutes should co-exist until November, 1974. (Section 227 of the Organized Crime Control Act of 1970). The Court of Appeals for the Seventh Circuit obviously found that intent of Congress that they continue, during that period, to co-exist to be conclusive, for it held:

> "In view of the repeal, 'four years' after the effective date of §6002 which Congress expressly provided for, there is no reason for any claim of an implied repeal. Congress expressed its repeal of §2514. It settled the question whether §6002 was to be substituted, and this is a matter within the discretion of Congress. *See United States* v. *Claflin,* 97 U.S. 546, 551 (1878). Section 2514 is effective until the repeal date set by Congress is reached." (App. 3)

We submit it is here the Court of Appeals for the Seventh Circuit errs, and conflicts with decisions of this Court including *United States* v. *Claflin,* 97 U.S. 546, adverted to above. Clearly expressing the nature of the

question presented to be a judicial one, is this Court's decision in *District of Columbia* v. *Hutton,* 143 U.S. 18:

> "But even if Congress had supposed that that section was still the law, when; as a matter of fact, it had been repealed, it would make no difference in this consideration. *Postmaster-General* v. *Early,* 25 U.S. 12 Wheat. 136, 148 [6: 577, 582]; *South Ottawa* v. *Perkins,* 94 U.S. 260, 270 [24: 154, 158]; *United States* v. *Claflin,* 97 U.S. 546, 548 [24: 1082, 1083]. The question, *Was said §854 repealed by the Act of 1878?* That is a judicial question, to be determined by the courts, upon a proper construction of that section and subsequent legislation upon the same subject-matter, and is not for the legislative branch of the government to determine." 143 U.S. at 27.

II.

In addition and ancillary to the first reason why this Court should exercise jurisdiction, is the important constitutional question of whether the failure of the legislature to set standards regarding the application of conflicting statutes to the same subject matter applicable to the same persons in identical circumstances, is violative of Article I, Sections 1 and 8 of the Constitution of the United States.

We think it is clear that §6002 and 3 and §2514 cannot simultaneously exist under our Constitution and the decisions of this Court. We think it is equally clear from the minimal legislative history available that the true intent of Congress was that §2514 was to be called into play only when—and if—§6002 was found unconstitutional to avoid the delay incident to legislating again in the same field. But the same legislative history holding the two statutes in effect gave to the Executive the power—indeed the invitation—to use either at its pleasure.

> "Sen: McClellan: Well, you could proceed—you could explicitly elect which statute to proceed under." *Hearings on S. 30 Before the Subcom. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary,* 91st Cong. 1st Sess. 404 (1969).

The Court will note, of course, that there are no guidelines or standards upon which the Executive should make this explicit election.[4] In effect, it devolves upon the Executive, then, to make his own standard, and thus we have Executive legislation. It is then to the Executive to determine what is the line between who shall get the "use", and who shall get the "transactional" immunity. Both—or either—are to be invoked, and as has been seen before, whenever the Executive chooses. This Court has over and again inquired into the validity of statutes to determine whether Congress

> ". . . has itself established the standards of legal obligation, thus performing its essential legislative function, or, by the failure to enact such standards, has attempted to transfer that function to others." *Schechter* v. *United States,* 295 U.S. 495, 530.

The Congress has not enunciated any policy in allowing these two statutes to stand simultaneously. It has established no standard for the election of one over the other. There are no prescribed limits, and the Congress has not told the Executive what facts it must determine prior to the invocation of the one as against the other.

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[4] Both statutes provide for the invocation of the coercion when the United States Attorney judges the expected testimony is or may be in the public interest. Aside from having the same standard for invocation, the "public interest" is not a standard at all any more than was the "public good" as this Court determined in *Panama Refining Co.* v. *Ryan,* 293 U.S. 388, 412.

We submit the "election" given to the Attorney General is violative of Article 1, Sec. 1 and Article 1, Section 8, Clause 18 of the Constitution of the United States.

III.

This Court should exercise its jurisdiction to re-examine the important constitutional question of whether the Congress can effectively legislate in the area of curtailment of constitutional rights in that it is a matter for referendum.

These petitioners are aware of this Court's decisions in *Brown* v. *Walker,* 161 U.S. 591 and *Ullman* v. *United States* 350 U.S. 422 which carefully and exhaustively considered the many incidents to a legislative enactment coercing testimony of a recalcitrant witness, as it was to be balanced against the self-incrimination privilege of the Fifth Amendment to the Constitution of the United States. Indeed, this Court described immunity statutes as "part of our constitutional fabric". 350 U.S. at 438. We are aware that, in those cases particularly, this Court has found the grant of so-called "transactional" immunity an adequate substitution for the privilege because the possibility of his testimony being used in "any criminal case" was obviated by the prohibition against the institution of "any criminal case." We would, as did counsel in *Ullman,* urge the Court to reconsider those decisions for the cogent reasons expressed by the dissents in those cases.

We would also urge as an additional reason the very pervasiveness of the statutes now under consideration. §6002 and 3 extending to all offenses known in the federal law.

We further submit as an additional consideration that the Fourth Amendment, which insures the right of the people to be secure against unreasonable searches and

seizures, is not limited to criminal prosecutions to be satisfied by an amnesty. It says directly that the government may not encroach upon the privacy of the person without probable cause. We submit that probable cause is not supplied by the "judgment of the United States Attorney," and these statutes requiring not only divulgence of the secrets of a person but production of his books and papers, against his will, without cause, offend against the right of people to be secure.

We believe particularly in a government that boasts its freedom a unilateral imposition of an amnesty is incongruous. A right given by the legislature to the executive to *offer* an amnesty is one thing; a right to *impose* an amnesty surrounded by criminal consequences for refusing conflicts with our historical image against rubbing red pepper into a poor devil's eyes. *On Lee* v. *United States,* 343 U.S. 747, 761 (Mr. Justice Frankfurter dissenting).

Indeed what is involved here has been best expressed by Judge Peter S. Grosscup in *United States* v. *James,* 60 F. 257, 26 LRA 418.[5]

> The effectiveness of the statue of February 11, 1893, might well be questioned on another ground. It is a

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[5] Judge Grosscup refers to the statute of February 11, 1893, at page 258 of the *James* opinion to illustrate he was considering "transactional" immunity:

> The act of February 11, 1893, in effect provides that no person shall be excused from testifying or producing books, papers, tariffs, contracts, agreements and documents in any case or proceeding, criminal or otherwise, based upon the interstate commerce act, on the ground that the same may tend to criminate him, or subject him to a penalty or forfeiture, but that any person so testifying shall not be prosecuted or subjected to any penalty or forfeiture, on account of any transaction, matter, or thing concerning which he may testify, or produce the documentary or other evidence.

statute of pardon. Until the witness makes his disclosure he is chargeable with the offense within his personal knowledge. The pardon becomes effective only at the moment and upon condition of disclosure. But pardon is not necessarily unilateral. *No person is compelled to accept the legislative or executive grace.* Chief Justice Marshall, speaking for the supreme court, so held in Wilson's Case 7 Pet. 150, where a pardon was granted by the president for a capital offense. In the case at bar, it must be assumed that the witness is guilty of some offense. In the absence of the statute of February 11, 1893, he has the undoubted constitutional right of silence. *It is said that that right is taken away by the immunity or pardon extended by the statute. But he chooses not to accept such immunity or pardon.* His refusal to answer the question is such refusal of acceptance. He prefers to stand upon his constitutional right and take his chances of conviction, rather than expose himself to the civil liabilities and the odium of self-confessed crime. It may be that the offense is of an ancient date, and has been succeeded by years of immaculate conduct and citizenship. Exposure, self-confessed exposure, would lose him his place in society, his good name in the world, and, like a bill of attainder, taint his blood and that of all who inherit it. It might well be that he would refuse to give up the sacred privilege of silence for a pardon. It is not difficult to suppose a case where the inquiry of the government was not directed to his crime, but to something immeasurably less important and inconsequential. The benefit to society might be a trifle, compared with the catastrophe to him and his descendants. I am not impressed with the belief that he has no right to stand upon the constitutional privilege of silence, and thus refuse the grace of the legislative or executive power. For the foregoing reasons the rule will be discharged. (Emphasis supplied)

We realize public odium has been considered by this Court beyond the protection of the Fifth Amendment. But we submit it is not beyond the right of privacy protected by the Fourth. We suggest the protection is apparent when every State and the United States, by their laws, sanction criminally intimidation or blackmail on a threat to expose a person to hatred, contempt or ridicule (or words to that effect), all appearing thereby to recognize at least, a property right in one's good name and dignity.

We urge this Court to reconsider its holding in *Brown* v. *Walker*, 161 U.S. 591 and *Ullman* v. *United States*, 350 U.S. 442. We urge the Court to examine whether or not in view of the Constitutional protection an immunity grant must not be bilateral. Can the Legislature take away petitioners' rights unilaterally? Can this be done absent referendum?

The Court of Appeals found itself bound by the majority opinions in those cases. We have no quarrel with their considering themselves bound by this Court as the Supreme Law of the Land, but our purpose was to preserve the question before this Court, where we now ask that those earlier decisions be reconsidered, especially in the light of now pervasive immunity statutes, which, in their totality, effectively negate constitutional rights. We will suggest to this Court reconsider the effect of:

(a) The inquisitorial, as opposed to accusatory, result ensuing.

(b) The sacrifice of the right of privacy inherent in the Constitution, and dear to its framers.

(c) The enforced production of knowledge, "books, papers, and other evidence" without reasonable cause required.

(d) The determination that there is no constitutional shield from the resulting public opprobrium, especially when every State and the United States, by their laws recognize a property right in a man's good name and dignity.

These are important questions today in view of what these petitioners had to choose: jail or inform. Eighteen months in Cook County Jail is indeed a dear price to pay for the right of silence in the face of accusation.

CONCLUSION

Wherefore, for the above and foregoing reasons, these petitioners pray that a Writ of Certiorari be issued to the United States Court of Appeals for the Seventh Circuit in this case.

Respectfully submitted,

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Attorney for Petitioners

Of Counsel:
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APPENDIX

APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604
June 17, 1971

Before

Hon. ROGER J. KILEY, *Circuit Judge*
Hon. JOHN PAUL STEVENS, *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*

No. 71-1408 vs.

JOHN ALEXANDER WOMACK and JAMES ANDREW ROBINSON, Witnesses before the Special February, 1971, Grand Jury,

Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

ORDER

Appellants refused, on Fifth Amendment grounds, to answer questions asked of them by the Grand Jury. The district court granted them transactional immunity under 18 U.S.C. § 2514, and ordered appellants to answer the Grand Jury questions. Appellants persisted in their re-

fusal to answer, were held in contempt of court and incarcerated for the life of the Grand Jury or until such time as they answer the Grand Jury questions. The district court denied bail, and appellants filed in this court their appeal from the contempt conviction. This court on June 3, 1971 denied their Emergency Motion for bail and set forth an expedited appeal briefing schedule.

Appellants have renewed their motion for bail in this court. In the motion appellants urge us, should we find the appeal frivolous, to enter the "appropriate order." We have decided that the appellants' appeal is frivolous and that it should be dismissed. Accordingly we need not pass on the renewed motion for bail.[1]

I.

Appellants contend in their brief that the "transactional immunity" statute, 18 U.S.C. § 2514, and the later "use immunity" statute, 18 U.S.C. § 6002 (Section 201 of the Organized Crime Control Act of 1970), are in conflict and that § 6002 repeals by implication § 2514. One of appellants' arguments in support of the contention is that § 227 of the Organized Crime Control Act of 1970 provides that 18 U.S.C. § 2514 "is repealed effective four years after the effective date" of the 1970 Crime Control Act, and thus discloses uncertainly of the constitutionality of § 2514 in the minds of the Department of Justice and Congress. Another argument is that a Department of Justice agent

[1] We shall refer to one point, however. In denying the original motion for bail this court concluded that the appeal "may be frivolous or taken for delay." Appellants state that that conclusion using "may" indicated "speculation, as opposed to a finding . . . and expressed no certainty" as required by 18 U.S.C. § 1626(b). That section requires that appellants not be admitted to bail "if it appears that the appeal is frivolous or taken for delay." We think the use of the word "may" in our previous order was proper.

before a Senate committee testified to doubt about the constitutional effect of not repealing § 2514 in view of the crime control bill and that "you couldn't have two statutes in conflict." They argue that § 6002 was "merely cumulative" of the provisions of § 2514, and thus its provisions are repugnant to the latter's provisions.

In view of the repeal, "four years" after the effective date of § 6002 which Congress expressly provided for, there is no reason for any claim of an implied repeal. Congress expressed its repeal of § 2514. It settled the question whether § 6002 was to be substituted for § 2514 and when it was to be substituted, and this is a matter within the discretion of Congress. *See United States* v. *Claflin*, 97 U.S. 546, 551 (1878). Section 2514 is effective until the repeal date set by Congress is reached.

II.

Appellants also contend that Congress intended that § 2514 could be resorted to only if and after § 6002 was held unconstitutional, and that § 2514 was not to be used as an elective according to the Department of Justice's "caprice." They argue that the Department has not conducted itself in accordance with that purpose, since the approval of the Attorney General necessary to an application for an immunity order under § 2514 was secured on May 7, 1971, two weeks before this court's ruling that § 6002 was unconstitutional.[2]

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[2] This court recently, in *In the Matter of Jack Korman and Robert W. Likas, Witnesses Before the Special February 1971 Grand Jury*, No. 71-1328 (7th Cir., filed May 20, 1971), reversed contempt convictions based on appellants' refusal to testify under grant of immunity by the district court on the basis of § 6002. The court held that that section was infirm constitutionally on the basis of *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892), because the grant of immunity was less than the minimal immunity needed to replace the Fifth Amendment protection.

We are not persuaded by the quoted statements of Senator McClellan and an agent of the Department of Justice that § 2514 was intended by Congress not to be effective during the four year pre-repeal period. Neither Senator McClellan nor the Department could change the force of § 227 by their statement. Moreover, § 2514 was actually used by the United States Attorney only after this court had declared § 6002 unconstitutional.

III.

Appellants further contend that § 2514 was not used by the United States Attorney to coerce testimony necessary to the public interest, but rather to bring about indirectly the incarceration of appellants without indictment or trial. We see no merit in this contention, based on the questions asked by the Grand Jury. We are not persuaded that the Grand Jury inquiry into illegal gambling is not in the public interest and that the questions are not related to that inquiry. Appellants do not state that they raised this point in the district court or called upon the court for protection against the Grand Jury's claimed abuse of its process.

IV.

We consider specious the argument that Congress modified the Fifth Amendment by enacting § 2514 and that in doing so arrogated to itself power to amend the Constitution. Appellants rely upon the dissent in *Brown* v. *Walker*, 161 U.S. 591 (1896), for their argument. However, the majority of the Court in *Brown* affirmed dismissal of the contemnor's habeas proceeding and held that the protection of the "transactual immunity" statute there was coextensive with the Fifth Amendment protection.

V.

We think appellants' final argument is also specious. They argue that even if the two conflicting statutes can lawfully stand, Congress cannot delegate to the Department of Justice an election to choose which statute to use unless suitable standards are provided to guide the election. The point argued assumes a conflict which appellants have not established, and is unpersuasive.

1 5

In the

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

I, KENNETH J. CARRICK, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing ..... pages contain a true copy of

1. ORDER ENTERED JUNE 17, 1971 DISMISSING THE APPEAL.

Cause No. 71-1408

IN RE: SPECIAL FEBRUARY 1971 GRAND JURY JOHN ALEXANDER WOMACK and JAMES ANDREW ROBINSON, Witnesses-Appellants

vs.

UNITED STATES OF AMERICA, Appellee.

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

IN TESTIMONY WHEREOF I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this 23rd day of JUNE A.D. 1971.

Kenneth J. Carrick
Kenneth J. Carrick

Clerk of the United States Court of Appeals for the Seventh Circuit.

(Seal)

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-23

JOHN ALEXANDER WOMACK &
JAMES ANDREW ROBINSON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In March 1971, at Chicago, Illinois, petitioners were called as witnesses before a grand jury investigating interstate gambling. They refused to testify on grounds of self-incrimination (Pet. 7-8). Subsequently, in May 1971, they were given immunity under 18 U.S.C. 2514 and ordered to testify. Upon their continued refusal, they were adjudged in civil contempt on May 25, 1971, and ordered committed. Bail pending appeal was denied. Appeal from the

commitment order and denial of bail was expedited. On June 17, 1971, the court of appeals denied all requested relief (Pet. 11-12, Pet. App. 1-5). On July 6, 1971, Mr. Justice Marshall denied bail pending the filing and determination of a petition for a writ of certiorari.

Petitioners contend essentially that 18 U.S.C. 2514, under which they were granted "transactional immunity," is no longer valid because a subsequent statute, passed in 1970, which permits the government to grant more limited "use immunity," 18 U.S.C. 6002, has, in effect, repealed the "transactional immunity" statute.[1] Congress, however, specifically provided that the repeal of the "transactional immunity" statute is to become effective four years after the effective date of the 1970 "use immunity" statute. Section 227 of the Organized Crime Control Act of 1970, P.L. 91-452, 84 Stat. 930. The explicit purpose of continuing the "transactional immunity" statute in effect for this period is to prevent delays in the enforcement of the criminal laws due to recalcitrant witnesses while the constitutionality of the "use immunity" statute is challenged in the courts. See Hearings on S. 30 (*inter alia*) Before the Subcommittee on Criminal Laws and Procedures of the

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[1] The "transactional immunity" statute, 18 U.S.C. 2514, provides immunity from prosecution, for "any transaction, matter or thing concerning which" the witness is compelled to testify, in a broad, enumerated class of cases, including gambling offenses. Pet. 5-6. The "use immunity" statute, 18 U.S.C. 6002, provides immunity, in criminal cases generally, against use of testimony or any leads derived therefrom. Pet. 4.

Senate Committee on the Judiciary, 91st Cong., 1st Sess., 403-404 (1969). There is no serious basis, as the court of appeals below held (Pet. App. 2-3), on which to question the propriety of this action by Congress. Indeed, "[i]t is a cardinal principle of construction that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible." *United States* v. *Borden Co.*, 308 U.S. 188, 198.[2]

In this case, at all events, since petitioners have been given the broader immunity under the old statute, they cannot complain because the narrow immunity under the new statute was not applied to them. Nor have petitioners advanced any new considerations in support of their request that this Court reexamine the settled principle that "transactional immunity" is constitutionally valid. See *Reina* v. *United States*, 364 U.S. 507; *Ullmann* v. *United States*, 350 U.S. 422; see also *DiDomenico* v. *United States*, 420 F. 2d 1201, 1203 (C.A. 7), certiorari denied, 397 U.S. 1021; *Carter* v. *United States*, 417 F. 2d 384, 387 (C.A. 9), certiorari denied, 399 U.S. 935.

---

[2] The validity of the "use immunity" statute is pending before the Court in *Kastigar* v. *United States*, No. 70-117, certiorari granted, May 17, 1971. See also *United States* v. *Korman and Likas*, pending on petition for certiorari, No. 70-303. In *Korman and Likas*, the Seventh Circuit declared "use immunity" under 18 U.S.C. 6002 unconstitutional. In light of that ruling, the grant of transactional immunity here, to expedite the investigation, is thus consistent with Congress' express intent.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1971.

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No. 71-23

In the Supreme Court of the United States

OCTOBER TERM, 1970

IN RE JOHN ALEXANDER WOMACK and JAMES ANDREW ROBINSON, Witnesses Before the Special February 1971 Grand Jury, Northern District of Illinois, Eastern Division,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Petitioners,

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UNITED STATES OF AMERICA,

Respondent.

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Memorandum of the United States in Opposition to the Petition for Certiorari heretofore filed herein is, at least, truncated, if not perfunctory.

The essence of the Government's Memorandum opposing the grant of Certiorari is:

I. Repeals by implication are not favored, and

II. The Petitioners have no basis for complaint because the *immunity given* them under the old statute (18 U.S.C. 2514) was broader than that given under the new (18 U.S.C. 6002).

I.

Under this Point, the Government relies exclusively on certain statements by this Court in *United States* v. *Borden Co.*, 308 U.S. 188, and particularly at page 198. But they seem to have overlooked the rationale of this Court's decision in that case. Indeed, their own argument contradicts that rationale. In the *Borden* case, the Capper-Volstead Act gave the Secretary of Agriculture the power to enter into agreements regulating, supervising and controlling the milk industry in order to maintain orderly marketing conditions and to stabilize the purchasing power of agricultural commodities. It was the position of the defendants in that case that the pervasiveness of the Act was such as to repeal by implication the operation of the Sherman Anti-Trust Act in the dairy field. This Court held that, to the extent that the later Act collided with the plenary application of the Sherman Act, the Sherman Act was delimited. This is clear from the express language of this Court.

> "That the field covered by the Agricultural Act is not coterminus with that covered by the Sherman Act is manifest from the fact that the former is thus delimited by the prescribed action participated in and directed by an officer of government proceeding under the authority specifically conferred by Congress. As to agreements and arrangements not thus agreed upon or directed by the Secretary, the Agricultural Act in no way impinges upon the prohibitions and penalties of the Sherman Act, and its condemnation of private action in entering into combinations and conspiracies which impose the prohibited restraint upon interstate commerce remains untouched.
>
> * * *
>
> "These explicit provisions requiring official participation and authorizations show beyond question how far Congress intended that the Agricultural Act should

operate to render the Sherman Act inapplicable. If Congress had desired to grant any further immunity, Congress doubtless would have said so.

"An agreement made with the Secretary as a party, or an order made by him, or an arbitration award or agreement approved by him, pursuant to the authority conferred by the Agricultural Act and within the terms of the described immunity, would of course be a defense to a prosecution under the Sherman Act to the extent that the prosecution sought to penalize what was thus validly agreed upon or directed by the Secretary. Further than that the Agricultural Act does not go."

U. S. A. v. *Borden Co.*, 308 U.S. 188, 200, 201-2.

As we view the clear import of this decision, it says the Sherman Act is not repealed by law because the later Act —Capper-Volstead—did not cover the whole aspect of the Sherman Act. *But*, insofar as Capper-Volstead did invade the purview of Sherman, Sherman was, by operation of law, repealed.

Applying those principles, 18 U.S.C. §2514 definitely was delimited in its entirety by 18 U.S.C. §6002, for §6002 has greater application than does §2514, and includes every field in which §2514 was applicable. Further, the repealing provision (Section 227 of the Organized Crime Control Act of 1970) which repeals §2514 in its entirety to be supplanted by §6002 exclusively—though in the future—demonstrates a recognition that the later Act was intended to preempt the entire field.

We submit, as we did before, that §6002 by operation of law nullifies §2514, and the case upon which the Government relies, the *Borden* case, logically applied, supports that conclusion.

II.

The essence of the Government's argument under this Point is that given the alternative of the restraint on your liberty without bars as opposed to a restraint on your liberty with them, the former is more palatable. It is amazing to the writer—an admitted adult of the World War II era—that our philosophy of Government has apparently so changed. Is it a scant twenty-five years ago that we considered a Government that required father to confess upon son, son upon father, friend upon friend, so abhorrent that we must take up arms to have it obliterated from the face of the earth? Has the philosophy of this country so changed that a "free pass" satisfies the constitutional intendments, under the same Constitution? We think not! So conservative a newspaper as the Wall Street Journal noted the frightening progress of this new philosophy.

> —critics say the chief victims so far have been witnesses who have been held in contempt of court for refusing to testify before the juries.
>
> *Contempt Proceedings on Rise*
>
> Under federal rules, a witness who is granted immunity from prosecution and still refuses to testify can be jailed on contempt charges for as long as the grand jury is sitting—up to 18 months, in some cases—or until he agrees to testify. The number of contempt sentences meted out by courts overseeing grand jury proceedings isn't known—the Justice Department says it doesn't keep such figures—but most observers agree there has been a definite increase in contempt proceedings.
>
> Wall Street Journal, July 29, 1971, page 1.

It is our contention that the immunity statutes are valid, so long as they are not compulsory. It would be foolish not to recognize the position of informers in effective law enforcement, their history dating back hundreds of years, indeed thousands. It is our position that it should be their (the informer's) decision. To give to the Executive the right to immunize to secure informers' testimony is one thing, a bargaining principal available to one receptive to bargaining. To extract the citizen from his privacy under threat of jail is another. To condemn him to jail for failing to relinquish his privacy sets us back twenty-five years and puts us in the odious historical niche of our erstwhile opponents.

CONCLUSION

Wherefore, for the above and foregoing reasons, these petitioners pray that a Writ of Certiorari be issued to the United States Court of Appeals for the Seventh Circuit in this case.

Respectfully submitted,

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CERTIORARI DENIED N.C.R.